

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MICHAEL A. HOWL,

Plaintiff,

v.

BANK OF AMERICA, N.A.; BAC HOME LOANS
SERVICING, LP; PRLAP, INC.; and
RECONTRUST COMPANY, N.A.,

Defendants.

No. C 11-0887 CW

ORDER GRANTING
DEFENDANTS'
MOTION TO DISMISS
(Docket No. 20)

Pro se Plaintiff Michael A. Howl alleges that Defendants Bank of America, N.A.; BAC Home Loans Servicing, LP; PRLAP, Inc.; and ReconTrust Company, N.A., committed fraud with respect to a loan he obtained. Defendants move to dismiss Plaintiff's claims. Plaintiff opposes the motion. The motion was decided on the papers. Having considered the papers submitted by the parties, the Court GRANTS Defendants' motion to dismiss.

BACKGROUND

On or about August 25, 2007, Plaintiff allegedly obtained a loan for \$1.5 million to purchase property located at 288 Love Lane in Danville, California. Bank of America, Plaintiff's lender, allegedly failed to explain clearly the terms of his promissory note and deed of trust, but nevertheless asked him to sign these documents. Plaintiff maintains that he was "confused and puzzled by the lack of explanations." Compl. ¶ 18.¹ Thereafter, during

¹ Plaintiff's complaint is nearly identical to the complaints filed in Gilbert v. World Savings Bank, Case No. 10-05162 WHA (N.D. Cal.) and Miller v. Washington Mutual Bank FA, Case No. 10-5787 WHA

1 the life of the loan, Defendants allegedly "failed to properly
2 credit payments made, incorrectly calculated interest on the
3 accounts, and have failed to accurately debit fees." Id. ¶ 37.
4 Plaintiff also alleges that there has been "a severance of the
5 ownership and possession of the original Note and Deed of Trust."
6 Id. ¶ 26.

7 Plaintiff asserts claims for "misrepresentation and fraud;"
8 "rescission and restitution of voidable cognovit note;" "injunction
9 against wrongful foreclosure based on cognovit note;" violation of
10 California's Unfair Competition Law (UCL), Cal. Bus. & Prof. Code
11 §§ 17200, et seq.; and violation of the federal Racketeer
12 Influenced and Corrupt Organizations (RICO) Act, 18 U.S.C.
13 § 1962(c). He filed his action in Contra Costa Superior Court on
14 January 21, 2011. Defendants Bank of America, N.A.; BAC Home Loans
15 Servicing, L.P.; and ReconTrust Company, N.A. removed Plaintiff's
16 action to federal court on February 24, 2011.

17 LEGAL STANDARD

18 A complaint must contain a "short and plain statement of the
19 claim showing that the pleader is entitled to relief." Fed. R.
20 Civ. P. 8(a). When considering a motion to dismiss under Rule
21 12(b)(6) for failure to state a claim, dismissal is appropriate
22 only when the complaint does not give the defendant fair notice of
23 a legally cognizable claim and the grounds on which it rests.
24 Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). In
25 considering whether the complaint is sufficient to state a claim,

26 _____
27 (N.D. Cal.). His opposition brief resembles the one filed in
28 Miller.

1 the court will take all material allegations as true and construe
2 them in the light most favorable to the plaintiff. NL Indus., Inc.
3 v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986). However, this
4 principle is inapplicable to legal conclusions; "threadbare
5 recitals of the elements of a cause of action, supported by mere
6 conclusory statements," are not taken as true. Ashcroft v. Iqbal,
7 129 S. Ct. 1937, 1949-50 (2009) (citing Twombly, 550 U.S. at 555).

8 When granting a motion to dismiss, the court is generally
9 required to grant the plaintiff leave to amend, even if no request
10 to amend the pleading was made, unless amendment would be futile.
11 Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc., 911
12 F.2d 242, 246-47 (9th Cir. 1990). In determining whether amendment
13 would be futile, the court examines whether the complaint could be
14 amended to cure the defect requiring dismissal "without
15 contradicting any of the allegations of [the] original complaint."
16 Reddy v. Litton Indus., Inc., 912 F.2d 291, 296 (9th Cir. 1990).

17 DISCUSSION

18 Defendants first argue that Plaintiff's claims that challenge
19 the impending foreclosure sale are subject to California's so-
20 called tender rule. Under the rule, a plaintiff seeking to
21 challenge the lawfulness of a foreclosure sale must first allege
22 tender of the amount of the secured indebtedness. Abdallah v.
23 United Sav. Bank, 43 Cal. App. 4th 1101, 1109 (1996) (citing FPCI
24 RE-HAB 01 v. E & G Investments, Ltd., 207 Cal. App. 3d 1018, 1021-
25 22 (1989)); Smith v. Wachovia, 2009 WL 1948829, at *3 (N.D. Cal.).
26 Without pleading tender or the ability to offer tender, a plaintiff
27 cannot state a cause of action related to challenging a foreclosure
28

1 sale. Karlsen v. Am. Sav. & Loan Ass'n, 15 Cal. App. 3d 112, 117
2 (1971) (citing Copsey v. Sacramento Bank, 133 Cal. 659, 662
3 (1901)); Smith, 2009 WL 1948829, at *3 (citing Karlsen). Here, a
4 foreclosure sale has not yet occurred. Defendants identify no
5 authority requiring Plaintiff, under these circumstances, to allege
6 tender to assert his claims in such circumstances. See Silva-
7 Pearson v. BAC Home Loans Servicing, LP, 2011 WL 2633406, at *2
8 (N.D. Cal.) (rejecting defendants' argument that tender rule
9 applied to plaintiff's claims in the absence of a foreclosure
10 sale). Alicea v. GE Money Bank, 2009 WL 2136969 (N.D. Cal.), does
11 not support Defendants' position. In that case, a foreclosure sale
12 had occurred before the plaintiff brought suit. Id. at *1. Thus,
13 the tender rule does not require dismissal of Plaintiff's claims.
14 Defendants' remaining arguments are considered below.

15 I. Misrepresentation and Fraud Claim

16 Plaintiff brings claims for misrepresentation and fraud based
17 on Bank of America's conduct at the time he executed his loan
18 documents in August 2007. He also alleges that, during the life of
19 the loan, Defendants committed fraud by improperly crediting
20 payments he made and incorrectly calculating the interest applied
21 to his loan.

22 Defendants argue that this claim is time-barred. They cite
23 California Code of Civil Procedure section 338(d), which imposes a
24 three-year limitations period on claims based "on the ground of
25 fraud or mistake," except that such claims are "not deemed to have
26 accrued until the discovery, by the aggrieved party, of the facts
27 constituting the fraud or mistake." Much of the conduct of which
28

1 Plaintiff complains occurred in August 2007, outside of the
2 limitations period. Plaintiff insists that he nevertheless may
3 seek liability for this alleged misconduct because he did not
4 discover it until June 2009. However, he fails to plead any facts
5 explaining his discovery. To invoke the delayed discovery rule,
6 Plaintiff must "specifically plead facts to show (1) the time and
7 manner of discovery and (2) the inability to have made earlier
8 discovery despite reasonable diligence." E-Fab, Inc. v.
9 Accountants, Inc. Servs., 153 Cal. App. 4th 1308, 1324 (2007)
10 (emphasis in original; citation and internal quotation marks
11 omitted). Thus, to the extent that Plaintiff's misrepresentation
12 and fraud claim is based on conduct that occurred outside of the
13 limitations period, it must be dismissed. He is granted leave to
14 amend to plead facts supporting application of the delayed
15 discovery rule.

16 Additionally, this claim must be dismissed because Plaintiff
17 fails to plead facts with particularity, as required by Federal
18 Rule of Civil Procedure 9(b). Under California law, "[t]he
19 elements of fraud, which gives rise to the tort action for deceit,
20 are (a) misrepresentation (false representation, concealment, or
21 nondisclosure); (b) knowledge of falsity (or 'scienter'); (c)
22 intent to defraud, i.e., to induce reliance; (d) justifiable
23 reliance; and (e) resulting damage." Small v. Fritz Cos., Inc., 30
24 Cal. 4th 167, 173 (2003) (quoting Lazar v. Superior Court, 12 Cal.
25 4th 631, 638 (1996)). "In all averments of fraud or mistake, the
26 circumstances constituting fraud or mistake shall be stated with
27 particularity." Fed. R. Civ. Proc. 9(b). The allegations must be
28

1 "specific enough to give defendants notice of the particular
2 misconduct which is alleged to constitute the fraud charged so that
3 they can defend against the charge and not just deny that they have
4 done anything wrong." Semegen v. Weidner, 780 F.2d 727, 731 (9th
5 Cir. 1985). Statements of the time, place and nature of the
6 alleged fraudulent activities are sufficient, id. at 735, provided
7 the plaintiff sets forth "what is false or misleading about a
8 statement, and why it is false." In re GlenFed, Inc., Secs.
9 Litig., 42 F.3d 1541, 1548 (9th Cir. 1994). Scienter may be
10 averred generally, simply by saying that it existed. Id. at 1547;
11 see Fed. R. Civ. Proc. 9(b) ("Malice, intent, knowledge, and other
12 condition of mind of a person may be averred generally").
13 Allegations of fraud based on information and belief usually do not
14 satisfy the particularity requirements of Rule 9(b); however, as to
15 matters peculiarly within the opposing party's knowledge,
16 allegations based on information and belief may satisfy Rule 9(b)
17 if they also state the facts upon which the belief is founded.
18 Wool v. Tandem Computers, Inc., 818 F.2d 1433, 1439 (9th Cir.
19 1987).

20 Plaintiff argues that he is entitled to a relaxed application
21 of Rule 9(b) because Defendants have his original loan documents.
22 This argument is not persuasive. Part of his claim rests on
23 Defendants' alleged concealment of material information regarding
24 his loan's terms. These terms, however, are discussed in documents
25 that apparently bear his signature. See, e.g., Defs.' Request for
26
27
28

1 Judicial Notice (RJN), Ex. B at 14.² It is within Plaintiff's
2 knowledge as to how Defendants obfuscated or prevented him from
3 discovering this information at the time he executed his loan
4 documents; however, he fails to plead how they did so. Plaintiff's
5 claim is also based in part on Defendants' alleged fraudulent
6 conduct with respect to the application of his loan payments and
7 the interest they charged. He does not, however, plead any
8 statements made by Defendants that form the basis of this fraud.

9 Accordingly, Plaintiff's misrepresentation and fraud claim is
10 dismissed with leave to amend. In any amended pleading, Plaintiff
11 must allege facts that support application of the delayed discovery
12 rule. Additionally, he must aver "the who, what, when, where, and
13 how" of Defendants' purported fraudulent concealment of his loan's
14 terms, which appeared on documents he apparently signed, and of
15 Defendants' alleged fraud concerning the application of his
16 payments and calculation of interest. Vess v. Ciba-Geigy Corp.
17 USA, 317 F.3d 1097, 1106 (9th Cir. 2003).

18 II. Claim for Rescission and Restitution

19 Plaintiff brings a claim for "rescission and restitution of
20

21 _____
22 ² Plaintiff opposes Defendants' request for judicial notice,
23 asserting that Defendants have failed to submit originals of the
24 documents. There is no requirement that Defendants proffer
25 originals in order to obtain judicial notice. Plaintiff also
26 asserts that the documents "could have been altered or changed"
27 without his knowledge. Opp'n at 2:4. He does not contend,
28 however, that there are any actual changes to the documents, nor
does he contest that his signature appears on some of them.
Accordingly, the Court takes judicial notice of the fact that the
adjustable rate note and deed of trust for Plaintiff's August 2007
loan bear a signature that appears above a line intended for
Plaintiff's signature. See Fed. R. Evid. 201.

1 voidable cognovit note."³ Although not altogether clear, it
2 appears that Plaintiff seeks rescission of his loan agreement
3 because it contained cognovit clauses that Defendants did not
4 disclose and for which Defendants did not provide adequate
5 consideration. Based upon this rescission, Plaintiff apparently
6 seeks restitution of monies paid under the loan agreement.

7 Defendants argue that California Code of Civil Procedure
8 section 338(d) also bars this claim. However, California Code of
9 Civil Procedure section 337(3), not section 338(d), applies.
10 Section 337(3) imposes a four-year limitations period on an "action
11 based upon the rescission of a contract in writing." This section
12 also contains a delayed discovery provision, stating that where
13 "the ground for rescission is fraud or mistake, the time does not
14 begin to run until the discovery by the aggrieved party of the
15 facts constituting the fraud or mistake." Cal. Civ. Proc. Code
16 § 337(3). Hatch v. Collins, 225 Cal. App. 3d 1104 (1990), does not
17 concern rescission based on fraud or address section 337(3), and
18 does not support Defendants' position. Because this claim was
19 asserted within the four-year limitations period, it is not time-
20 barred.

21 Plaintiff, however, does not adequately state this claim. The
22 fraud allegations on which it is based, as explained above, do not
23

24 ³ A "cognovit note" contains provisions that attempt, in
25 advance of any legal controversy, to authorize the entering of
26 judgment without notice and hearing. Isbell v. Cnty. of Sonoma, 21
27 Cal. 3d 61, 76 (1978). Without factual support, Plaintiff's
28 assertion that his deed of trust was a cognovit note is a legal
conclusion that need not be taken as true. See Iqbal, 129 S. Ct.
at 1949-50.

1 satisfy Rule 9(b)'s pleading requirements. Indeed, Plaintiff does
2 not identify the provisions he contends are cognovit clauses.

3 Thus, for the reasons stated above, this claim must be
4 dismissed.

5 III. Claim for Injunctive Relief

6 Plaintiff brings a claim for injunctive relief against a
7 wrongful foreclosure, which he bases on a litany of state causes of
8 action and federal statutes. Because the Love Lane property has
9 not yet been sold at a foreclosure sale, this appears to be a
10 request for a preliminary injunction. Defendants argue that
11 Plaintiff fails to make the showing necessary to obtain preliminary
12 injunctive relief.

13 "A plaintiff seeking a preliminary injunction must establish
14 that he is likely to succeed on the merits, that he is likely to
15 suffer irreparable harm in the absence of preliminary relief, that
16 the balance of equities tips in his favor, and that an injunction
17 is in the public interest." Winter v. Natural Res. Def. Council,
18 Inc., 129 S. Ct. 365, 374 (2008). Alternatively, "a preliminary
19 injunction could issue where the likelihood of success is such that
20 serious questions going to the merits were raised and the balance
21 of hardships tips sharply in plaintiff's favor," so long as the
22 plaintiff demonstrates irreparable harm and shows that the
23 injunction is in the public interest. Alliance for the Wild
24 Rockies v. Cottrell, 632 F.3d 1127, 1131 (9th Cir. 2011) (citation
25 and internal quotation and editing marks omitted). Plaintiff did
26 not respond to Defendants' argument that he did not meet the
27 requirements set forth by Winter and its progeny. Accordingly,

1 Plaintiff's request for a preliminary injunction is denied.

2 IV. UCL Claim

3 California's Unfair Competition Law (UCL) prohibits any
4 "unlawful, unfair or fraudulent business act or practice." Cal.
5 Bus. & Prof. Code § 17200. The UCL incorporates other laws and
6 treats violations of those laws as unlawful business practices
7 independently actionable under state law. Chabner v. United of
8 Omaha Life Ins. Co., 225 F.3d 1042, 1048 (9th Cir. 2000).

9 Violation of almost any federal, state or local law may serve as
10 the basis for a UCL claim. Saunders v. Superior Court, 27 Cal.
11 App. 4th 832, 838-39 (1994). In addition, a business practice may
12 be "unfair or fraudulent in violation of the UCL even if the
13 practice does not violate any law." Olszewski v. Scripps Health,
14 30 Cal. 4th 798, 827 (2003). Claims under the UCL must be brought
15 "within four years after the cause of action accrued." Cal. Bus. &
16 Prof. Code § 17208.

17 Plaintiff's UCL claim is based on Defendants' alleged
18 fraudulent conduct. As already stated, Plaintiff fails to allege
19 fraud with sufficient particularity. Accordingly, Plaintiff's UCL
20 claim is dismissed with leave to amend.

21 V. RICO Claim

22 "To state a claim under § 1962(c), a plaintiff must allege
23 '(1) conduct (2) of an enterprise (3) through a pattern (4) of
24 racketeering activity.'" Odom v. Microsoft Corp., 486 F.3d 541,
25 547 (9th Cir. 2007) (quoting Sedima, S.P.R.L. v. Imrex Co., 473
26 U.S. 479, 496 (1985)). Defendants argue that Plaintiff fails to
27 allege a RICO enterprise and a pattern of racketeering. Plaintiff

1 did not respond to Defendants' argument. Accordingly, Plaintiff's
2 RICO claim is dismissed with leave to amend to plead facts
3 demonstrating a RICO enterprise and a pattern of racketeering
4 activity.

5 CONCLUSION

6 For the foregoing reasons, the Court GRANTS Defendants' motion
7 to dismiss. (Docket No. 20.) The Court's holdings are summarized
8 as follows:

- 9 1. Plaintiff's misrepresentation and fraud claim is
10 dismissed for failure to plead in accordance with Rule
11 9(b). To the extent the claim concerns conduct outside
12 of the limitations period, it is dismissed as time-
13 barred. Plaintiff is granted leave to amend to plead
14 specific facts concerning the alleged fraud and that
15 support the application of the delayed discovery rule.
- 16 2. Plaintiff's claim for rescission and restitution is
17 dismissed for failure to plead in accordance with Rule
18 9(b). He is granted leave to amend to allege specific
19 facts concerning Defendants' purported fraud.
- 20 3. Plaintiff's apparent request for preliminary injunctive
21 relief is denied based on his failure to meet the
22 requirements set forth in Winter and its progeny.
- 23 4. Plaintiff's UCL claim, which is based on Defendants'
24 alleged fraudulent conduct, is dismissed with leave to
25 amend to plead facts in accordance with Rule 9(b).
- 26 5. Plaintiff's RICO claim is dismissed with leave to amend
27 to allege facts showing a RICO enterprise and a pattern
28

1 of racketeering activity.

2 If Plaintiff intends to file an amended complaint, he shall do
3 so within fourteen days of the date of this Order. If Plaintiff
4 files an amended complaint, Defendants shall respond to it fourteen
5 days after it is filed. If Defendants move to dismiss the
6 complaint, Plaintiff shall respond to Defendants' motion within
7 fourteen days after it is filed. Defendants' reply, if necessary,
8 shall be due seven days after Plaintiff files his response. Any
9 motion to dismiss will be decided on the papers. Plaintiff's
10 failure to comply with this Order will result in the dismissal of
11 his claims for failure to prosecute.

12 Pursuant to Civil L.R. 16-8 and ADR L.R. 2-3, the Court refers
13 this foreclosure-related action to the Alternative Dispute
14 Resolution (ADR) Unit to assess this case's suitability for
15 mediation or a settlement conference. Plaintiff and Defendants'
16 counsel shall participate in a telephone conference, to be
17 scheduled by the ADR Unit on a date before September 14, 2011.

18 Plaintiff and Defendants' counsel shall be prepared to discuss
19 the following subjects:

- 20 (1) Identification and description of claims and alleged
21 defects in loan documents.
22 (2) Prospects for loan modification.
23 (3) Prospects for settlement.
24 (4) Any other matters that may be conducive to the just,
25 efficient and economical determination of the
26 action.

27 The parties need not submit written materials to the ADR Unit for
28 the telephone conference.

In preparation for the telephone conference, Plaintiff shall do the following:

- (1) Review relevant loan documents and conduct a brief investigation of claims to determine whether the claims in this action have merit.
- (2) If Plaintiff is seeking a loan modification to resolve all or some of his claims, he shall prepare a current, accurate financial statement and gather all of the information and documents customarily needed to support a loan modification request. Further, Plaintiff shall immediately notify Defendants' counsel of his request for a loan modification.
- (3) Provide counsel for Defendants with information necessary to evaluate the prospects for loan modification. The general and financial information provided to Defendants may be in the form of a financial statement, worksheet or application customarily used by financial institutions.

In preparation for the telephone conference, counsel for Defendants shall do the following.

- (1) If Defendants are unable or unwilling to do a loan modification after receiving notice of Plaintiff's request, counsel for Defendants shall promptly notify Plaintiff to that effect.
- (2) Arrange for a representative of each Defendant with full settlement authority to participate in the telephone conference.

The ADR Unit will provide the parties with additional information regarding the telephone conference, including the date it will be held. After the telephone conference has been held, the ADR Unit will advise the Court of its recommendation for further ADR proceedings.

//

//

//

1 A case management conference will be held on November 22, 2011
2 at 2:00 p.m.

3 IT IS SO ORDERED.

4
5 Dated: 8/17/2011



CLAUDIA WILKEN
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

MICHAEL A HOWL,
Plaintiff,

Case Number: CV11-00887 CW

CERTIFICATE OF SERVICE

v.

BANK OF AMERICA NA et al,
Defendant.

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on August 17, 2011, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Michael A. Howl
PO Box 916
Danville, CA 94526

Dated: August 17, 2011

Richard W. Wieking, Clerk
By: Nikki Riley, Deputy Clerk

United States District Court
For the Northern District of California